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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

TIANHAI LACE USA, INC.,

Plaintiff,

- against -

LORD & TAYLOR LLC,
Adrianna Papell, LLC, and DOES 1-10,

Defendants.

Civil Action No. 1:19-cv-4816 (JMF)

LORD & TAYLOR LLC AND
ADRIANNA PAPELL, LLC's **FIRST
AMENDED ANSWER AND
AFFIRMATIVE DEFENSES TO
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

DEMAND FOR JURY TRIAL

Defendants LORD AND TAYLOR, LLC ("L&T") and ADRIANNA PAPELL, LLC. ("AP") (collectively, "Defendants"), through their undersigned attorneys, hereby submits its First Amended Answer and Affirmative Defenses ("FAA") to Plaintiff Tianhai Lace USA, Inc's First Amended Complaint (hereinafter, "FAC" or "Complaint")), filed on November 4, 2019, as follows:

Introduction

As to the opening paragraph of the Complaint, unlabeled, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and

accordingly, denies same, except for, AP admits that it is in the business of advertising, marketing and/or supplying garments wholesale to U.S. retailers.

The Parties

1. As to paragraph 1 of the Complaint, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

2. Defendants deny the allegations in paragraph 2 of the Complaint, except L&T admits that it is a Delaware corporation, organized under the laws of the State of Delaware.

3. Defendants deny the allegations in paragraph 3 of the Complaint, except AP admits that it is a New York limited liability company, organized under the laws of the State of New York, and located at 500 Seventh Avenue, 10th Floor, New York, NY 10018.

4. Defendant denies the allegations of paragraph 4 of the FAC, except, as to other defendants referenced therein, Defendants lacks knowledge or information sufficient to form a belief as to the truth of the allegation set forth in paragraph 4 of the FAC.

Jurisdiction and Venue

5. Defendants deny the allegations in paragraph 5 of the Complaint, except admit that the United States Copyright Laws, *inter alia*, provide for the defenses and rights of the Defendants.

6. Defendants admit the allegations in paragraph 6 of the FAC.

7. Defendants deny the allegations in paragraph 7 of the FAC, except admit that this Court has personal jurisdiction over the Defendants.

8. Defendants deny the allegations in paragraph 8 of the FAC, except admit that venue is proper in this District for the instant action.

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Facts Common To All Counts

9. As to paragraph 9 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

10. To the extent of Defendants understanding of numbered paragraph 10 of the FAC, Defendants deny all allegations in paragraph 10 of the FAC.

11. As to paragraph 11 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

12. As to paragraph 12 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

13. As to paragraph 13 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

14. As to paragraph 14 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

15. As to paragraph 15 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

16. As to paragraph 16 of the FAC, Defendants deny the allegations within this paragraph 16 of the FAC.

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The Y045A Pattern

17. As to paragraph 17 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

18. As to paragraph 18 of the Complaint, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

19. As to paragraph 19 of the FAC, Defendants deny all allegations.

20. As to paragraph 20 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

21. As to paragraph 21 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

22. As to paragraph 22 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

23. As to paragraph 23 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

The YDA16 Pattern

24. As to paragraph 24 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

25. As to paragraph 25 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

26. As to paragraph 26 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

27. As to paragraph 27 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

28. As to paragraph 28 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

29. As to paragraph 29 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

30. As to paragraph 30 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

The Y0241 Pattern

31. As to paragraph 31 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

32. As to paragraph 32 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

33. As to paragraph 33 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

34. As to paragraph 34 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

35. As to paragraph 35 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

36. As to paragraph 36 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

37. As to paragraph 37 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

Defendants' Infringing Activities

38. Defendants deny all allegations in paragraph 38 of the FAC, except L&T admits that it is a retailer of apparel for women, including clothing and accessories. L&T further admits that it advertises, sells, and/or ships women's apparel throughout the United States.

39. Defendants deny all allegations in paragraph 39 of the FAC, except L&T admits that it has brick-and-mortar stores within the United States.

40. Defendants deny all allegations in paragraph 40 of the FAC, except AP admits that it advertises, markets, distributes, sells and ships women's apparel products throughout the United States, including to various brick-and-mortar retailers.

41. As to paragraph 41 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny

the same, except for Defendants admit to specific knowledge of Plaintiff's claim that Macys, Inc. is a DOE Defendant concerning the alleged claims of infringement in the FAC.

42. Defendants deny the allegations of paragraph 42 of the Complaint, except, as to the other DOE defendants referenced therein. AP lacks knowledge or information sufficient to form a belief as to the truth of the allegations concerning other DOE defendants set forth in paragraph 42 of the FAC and accordingly, deny the same.

43. As to paragraph 43 of the Complaint, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

44. Defendants deny all allegations in paragraph 44 of the FAC.

45. Defendants deny all allegations in paragraph 45 of the Complaint, except admit that Adrianna Papell supplied Style No. 012260490 to L&T.

46. Defendants deny all allegations in paragraph 46 of the FAC, except admit that Adrianna Papell supplied Style No. 012260490 to L&T.

47. As to paragraph 47 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

48. As to paragraph 48 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

49. Defendants deny all allegations in paragraph 49 of the FAC.

50. Defendants deny all allegations in paragraph 50 of the FAC, except admit that Adrianna Papell supplied Style No. 151A14460 to its retail customer.

51. Defendants deny all allegations in paragraph 51 of the FAC, except admit that Adrianna Papell supplied Style No. 151A14460 to its retail customer.

52. As to paragraph 52 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

53. As to paragraph 53 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

54. Defendants deny all allegations in paragraph 54 of the FAC.

55. Defendants deny all allegations in paragraph 55 of the FAC, except admit that Adrianna Papell supplied Style No. MN1E200532 to its retail customer.

56. Defendants deny all allegations in paragraph 56 of the FAC, except admit that Adrianna Papell supplied Style No. MN1E200532 to its retail customer.

57. As to paragraph 57 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

58. Defendants deny the allegations of paragraph 58 of the FAC, except, Defendants admit that L&T has never transacted business with Style No. MN1E200532.

59. As to paragraph 59 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

60. Defendants deny the allegations of paragraph 60 of the FAC, except, as to the other defendants referenced therein. AP lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 60 of the Complaint and accordingly, deny the same. Furthermore, Defendants decline to answer numbered paragraph 60 of the FAC to the extent it references privileged attorney work product, common defense privilege, or attorney client privilege.

61. Defendants deny the allegations of paragraph 61 of the FAC.

62. Defendants deny the allegations of paragraph 62 of the FAC.

63. Defendants deny the allegations of paragraph 63 of the FAC.
64. Defendants deny the allegations of paragraph 64 of the FAC.
65. Defendants deny the allegations of paragraph 65 of the FAC.
66. Defendants deny the allegations of paragraph 66 of the FAC.
67. Defendants deny the allegations of paragraph 67 of the FAC.
68. Defendants deny the allegations of paragraph 68 of the FAC.
69. Defendants deny the allegations of paragraph 69 of the FAC.
70. Defendants deny the allegations of paragraph 70 of the FAC.
71. Defendants deny the allegations of paragraph 71 of the FAC.
72. Defendants deny the allegations of paragraph 72 of the FAC.
73. As to paragraph 73 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

74. Defendants deny the allegations of paragraph 74 of the FAC.
75. Defendants deny the allegations of paragraph 75 of the FAC.
76. Defendants deny the allegations of paragraph 76 of the FAC.
77. Defendants deny the allegations of paragraph 77 of the FAC.

First Claim for Relief

78. Defendants repeats and reasserts all of its denials set forth above, and Defendants deny each and every allegation, if any, contained in paragraph 78 of the FAC.

79. As to paragraph 79 of the FAC, to the extent Defendants understand the allegations under paragraph 79 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same. To the extent paragraph 79 asserts or provides for any legal position and/or conclusion, or states a basis for a legal argument, Defendants deny the same as, *inter alia*, improper.

80. As to paragraph 80 of the FAC, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation(s) set forth therein and accordingly, deny the same.

81. Defendants deny the allegations of paragraph 81 of the FAC.
82. Defendants deny the allegations of paragraph 82 of the FAC.
83. Defendants deny the allegations of paragraph 83 of the FAC.
84. Defendants deny the allegations of paragraph 84 of the FAC.
85. Defendants deny the allegations of paragraph 85 of the FAC.
86. Defendants deny the allegations of paragraph 86 of the FAC.
87. Defendants deny the allegations of paragraph 87 of the FAC.
88. Defendants deny the allegations of paragraph 88 of the FAC.
89. Defendants deny the allegations of paragraph 89 of the FAC.

RESPONSE TO PLAINTIFF'S PRAYER FOR RELIEF

1. In response to Plaintiff's Prayer for Relief, Defendants deny that Plaintiff's purported copyrights are valid and enforceable; that it infringed upon Plaintiff's copyrights; that Plaintiff is entitled to injunctive relief of any sort against Defendants; that Plaintiff is entitled to the impoundment of any goods in Defendants' custody or control; that Plaintiff is entitled to a monetary award of any sort (whether damages, statutory damages, profits, attorneys' fees, interest, costs or anything else) against either AP or L&T; that the alleged conduct by the Defendants was illegal or wrong; and that Plaintiff is entitled to any other relief from Defendants.

2. Defendants deny that Plaintiff is entitled to any of the relief requested in paragraphs A through N (including sub-paragraphs thereof) of the Prayer for Relief of the FAC.

AFFIRMATIVE DEFENSES

As separate and distinct affirmative defenses to the Complaint, and to each and every purported claim thereof, Defendants allege:

FIRST AFFIRMATIVE DEFENSE

1. The FAC fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

2. No liability can exist for copyright infringement or any related claims in this case because the copyrights Plaintiff alleges have been infringed are invalid, void and unenforceable, in whole or in part. Among other things, a reasonable opportunity for further investigation or discovery is more than likely to provide evidentiary support for, *inter alia*, one or more of the following:

(a) Plaintiff's United States Copyright Registration VA 1-762-651 claims material that is not original or not protectable, that is in the public domain, and/or that was originally developed by persons or entities other than Plaintiff. Attached hereto as "Exhibit A" are true and correct copies of deposit(s), the Chinese copyright registration issued by the Copyright Protection Centre of China and/or the Chinese Copyright Bureau ("Chinese Copyright Authority"), and the English translation thereof.

(b) Plaintiff's registrations for the asserted copyrights are for shown designs that are drawn or authored to Scenes à Faire," that is, to design(s) that are ordinary, commonplace, or standard in the relevant art and/or industry.

THIRD AFFIRMATIVE DEFENSE

3. Defendants have not infringed and are not liable for the infringement of the purported copyrights that Plaintiff asserts in this action, among other things, because Defendants did not copy any purported constituent original and protectable elements of any of Plaintiff's purported copyrighted work. Rather, the design(s) rendered on the accused goods traces from the independent original design, *inter alia*, as shown under "Exhibit A," which was independently created prior to Plaintiff's asserted claim(s) as related to the purportedly copyrightable design underscoring Copyright Registration VA 1-762-651.

FOURTH AFFIRMATIVE DEFENSE

4. Defendants have not infringed and are not liable for the infringement of the purported copyrights that Plaintiff asserts in this action, among other things, because there is no

substantial similarity between the ideas and expression of ideas rendered on the garments sold by Defendants and Plaintiff's purported copyrighted works.

FIFTH AFFIRMATIVE DEFENSE

5. The works that Plaintiff claims have been infringed are not entitled to copyright protection on the grounds that they are in the public domain and/or do not constitute copyrightable subject matter.

SIXTH AFFIRMATIVE DEFENSE

6. Plaintiff's claims are barred by the doctrine of merger.

SEVENTH AFFIRMATIVE DEFENSE

7. Defendants are informed and believe and on that basis, allege that the FAC, and each and every purported claim for relief thereof, is barred, in whole or in part, by Plaintiff's fraud or deception in the copyright registration process.

At least one of the design(s) in question is not original to the Plaintiff and the design(s) at issue and/or substantially similar designs were created and existed independently and separately from Plaintiff's supposed copyright work(s), namely the asserted work underscoring Copyright Registration VA 1-762-651, as demonstrated by "Exhibit A."

EIGHTH AFFIRMATIVE DEFENSE

8. Defendants acted in good faith and without any intent to infringe Plaintiff's rights or cause damage to Plaintiff; and if such good faith and lack of intent does not preclude liability, any general or statutory damages awarded to Plaintiff for this innocent infringement should be reduced accordingly.

NINTH AFFIRMATIVE DEFENSE

9. Defendants' conduct constitutes fair use, if any, of Plaintiff's purported copyrighted works.

TENTH AFFIRMATIVE DEFENSE

10. Plaintiff is barred from recovery, in whole or in part, because Plaintiff would be unjustly enriched if it is permitted to recover on the FAC.

ELEVENTH AFFIRMATIVE DEFENSE

11. This action is barred in whole or in part due to Plaintiff's unclean hands.

TWELFTH AFFIRMATIVE DEFENSE

12. This action is barred in whole or in part due to Plaintiff's acquiescence, as well as the doctrines of estoppel and waiver.

THIRTEENTH AFFIRMATIVE DEFENSE

13. If Plaintiff suffered any damages, which the Defendants deny, Defendants are informed and believes and on that basis alleges that Plaintiff failed to discharge its duty to mitigate damages.

FOURTEENTH AFFIRMATIVE DEFENSE

14. Defendants deny infringement and substantial similarities between the Subject Designs and the accused garments. Any alleged use of Subject Designs is, at most, *de minimis* and therefore not actionable.

FIFTEENTH AFFIRMATIVE DEFENSE

15. Each and every purported claim for relief in the FAC is barred, in whole or in part, because Plaintiff has failed to join parties, including without limitation others claiming ownership of the alleged copyright or copyrights asserted by Plaintiff in this action (as demonstrated by the documents and Chinese Copyright Authority's issuance of a copyright registration for the lace design used by the Defendants within the "Exhibit A" attached hereto), which are necessary for a full and complete adjudication of its claims, including without limitation as required by Rule 19 of the Federal Rules of Civil Procedure.

SIXTEENTH AFFIRMATIVE DEFENSE

16. If Plaintiff suffered any damages, which Defendants deny, Defendants allege that individuals or entities other than Defendants were careless and negligent in and about the matters alleged in the Complaint and that this carelessness and negligence proximately contributed to or caused any purported damages to Plaintiff; and should Plaintiff recover any damages, Defendants

are entitled to have the damages reduced or eliminated to the extent that third parties contributed to or caused the damages.

SEVENTEENTH AFFIRMATIVE DEFENSE

17. The laces, designs, prints, fabrics and/or garments of which Plaintiff complains were created prior to and/or independently from and without knowledge of Plaintiff's alleged work(s), as established with the Chinese Copyright Authority's registration (for at least one lace design used by the Defendants that is at issue in the instant action), documents, images and exemplars within the "Exhibit A" attached hereto.

EIGHTEENTH AFFIRMATIVE DEFENSE

18. Plaintiff's misuse of the purported copyright or copyrights bars, in whole or in part, each and every purported claim for relief in the FAC.

NINETEENTH AFFIRMATIVE DEFENSE

19. Plaintiff waived the claims and/or remedies it asserts.

TWENTIETH AFFIRMATIVE DEFENSE

20. Plaintiff ratified the conduct of which it complains.

TWENTY-FIRST AFFIRMATIVE DEFENSE

21. Plaintiff lacks standing to bring this suit. More specifically, *inter alia*, Plaintiff fails to allege, provide, show or disclose the work for hire agreements, rights agreements, and/or copyrights transfer statements inherently incorporated into the United States Copyright Registration(s) VA 1-762-651, VA 1-920-232, and VA 000 205 6744.

TWENTY-SECOND AFFIRMATIVE DEFENSE

22. Plaintiff's claim lacks originality, and Plaintiff's purported designs are not original, as established with the documents, images, and exemplars within the "Exhibit A" attached hereto.

TWENTY-THIRD AFFIRMATIVE DEFENSE

23. Plaintiff's each and every purported claim contained in the Complaint is barred, in whole and in part, because Defendants was privileged and justified in acting as it did as a company acting for business purposes in the marketplace, protected by the privilege for competitors.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

24. Defendants are informed and believe and on that basis allege that the Complaint, and each and every purported claim for relief thereof, is barred, in whole or in part, because Plaintiff, through its conduct, statement, actions, or omissions, impliedly and/or expressly granted Defendants, other Defendants in this action, or non-parties to this action a license to hold, use, reproduce, distribute, or sell the materials, works, designs, or products against which Plaintiff asserts its purported copyright or copyrights in this action.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

25. Plaintiff's copyright registrations and/or applications for copyright registration are defective.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

26. Defendants reserves the right to rely on any and all judicially recognized defenses under the Copyright Act of 1976, Title 17 U.S.C. § 101 et seq., and all amendments and revisions thereto.

ADDITIONAL AFFIRMATIVE DEFENSE

Defendants reserve the right to assert additional affirmative defenses if discovery or Defendants' investigation reveals grounds for the assertion of the additional defenses, including without limitation affirmative defenses that are referenced in Rule 8(c) of the Federal Rules of Civil Procedure or are otherwise available under applicable law.

PRAYER FOR RELIEF

WHEREFORE, Defendants prays for Judgment as follows:

1. That Plaintiff takes nothing, whether in the form of damages or injunctive relief, by its FAC and that the FAC be dismissed with prejudice;

2. For costs of suit including, without limitation, reasonable attorneys' fees as may be allowed under Section 505 of Title 17 of the United States Code and as may otherwise be allowed by law; and

3. For such other and further relief as the Court deems just and proper.

November 16, 2019
New York, New York

Respectfully Submitted,

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